Supreme Court, U.S.
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No. 92-883

In The

Supreme Court of the United States

October Term, 1992

CHARLES E. BERRY,

Petitioner,

vs.

A. DOE, J. DOE, HOSANA A. HUCK, MARIANNE McKINLEY, REBECCA PRICE, and NANCY CRAWFORD and MELISSA WALKER as Representative Parties on Behalf of a Definable Class,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT HOSANA A. HUCK AND MARIANNE McKINLEY

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QUESTIONS PRESENTED FOR REVIEW

I. Mr. Berry's allegations that state court damage actions for invasion of privacy have violated his rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1985(3) do not invoke laws providing for equal civil rights for purposes of removal under the Civil Rights Removal Act, 28 U.S.C. § 1443(1), because under settled case law, neither the Fourteenth Amendment Equal Protection Clause nor 42 U.S.C. § 1985(3) is a law providing for specific civil rights stated in terms of racial equality.

II. Mr. Berry's allegation of a pattern of racially-motivated actions during the course of state court criminal and civil proceedings provides no basis for invoking the Civil Rights Removal Act, 28 U.S.C. § 1443 (1) to remove state court damage actions to federal court, in that controlling precedent of this Court holds that state officials' actions must be pursuant to some explicit state law or statute to invoke removal under § 1443, and Mr. Berry fails to allege that any Missouri statute or law compels or mandates the misconduct he alleges. To allow removal, this Court would have to engage in the "unseemly process of prejudging their brethren of the state courts." *Georgia v. Rachel*, 384 U.S. 803-04 (1966).

III. The record before the district court and the Eighth Circuit conclusively establishes that the sanction orders entered against Mr. Berry and his counsel in the state court proceedings were richly deserved due to his contumaceous and deliberate refusal to comply with discovery orders and his deliberate efforts to delay the state court damage cases against him. Therefore, this case is factually inappropriate for this Court to exercise its discretion to review the abstract questions of law presented in petitioner's Brief.

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STATEMENT OF THE CASE

Respondents, Hosana A. Huck (Ms. Huck) and Marianne McKinley (Ms. McKinley) are involved in two cases in the state courts of Missouri with petitioner, Charles E. Berry (Mr. Berry). In *Huck et al. v. Berry,* No. 92-1726, in the Circuit Court of St. Charles County, Missouri, Ms. Huck and Ms. McKinley allege in their state court Petition, that Mr. Berry and others have invaded their privacy by secretly videotaping them using the women's restroom at a restaurant owned by Mr. Berry. In *Jones et al. v. Berry,* No. 92-1732 in the Circuit Court of St. Charles County, Missouri, Ms. Huck, Ms. McKinley and their attorney filed a state Interpleader action seeking a court order allowing the attorney to deposit certain videotape evidence with the state court, pending a determination of who was ultimately entitled to possession or ownership of the videotapes. Neither of the state court Petitions contains any allegation whatsoever relating to race; they both arise from simple state court law damage actions for invasion of privacy.

Mr. Berry attempted to remove these actions, and four other similar state court damage suits, to federal court, making conclusory, vague and outrageous allegations of a pattern of racially-motivated hostility toward him in these state court lawsuits. Mr. Berry alleges a massive conspiracy involving all of the state court damage plaintiffs, their attorneys, St. Charles County deputy sheriffs, and members of the Missouri state court judiciary to deprive him of his rights to equal protection of the law, based upon his race, to foster the state court damage suits. Despite his fantastic charges of misconduct and racial bias on the part of St. Charles County Circuit Judges, Mr. Berry has not sued any member of the state judiciary.

Mr. Berry's removal Petitions were filed in these respondent's cases on August 2, 1991 and September 20, 1991. So far, the

attempted removal has delayed the state court damage proceedings by sixteen (16) months.

Mr. Berry's basis for removal, according to his Brief, is violation of his rights to equal protection of the laws as guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1985(3). Neither of those provisions provides any basis for removal, as neither is a law providing for specific civil rights stated in terms of racial equality.

Mr. Berry's wild allegations regarding drug raids, child abuse prosecutions, defamatory police and prosecutorial press conferences have no relationship whatsoever to Ms. Huck's and Ms. McKinley's civil damage suits or the *Jones v. Berry* Interpleader action. All Ms. Huck and Ms. McKinley and their attorneys have done is attempt to pursue state common law damage actions for invasion of privacy, alleging that these women were surreptitiously videotaped using private stalls in a women's restroom at the Southern Aire Restaurant in Wentzville, Missouri, owned by Mr. Berry. Race is not a factor; these women would be just as outraged had these disgusting videotapes been made by a white, yellow or red individual.

As to Mr. Berry's allegations that the St. Charles County judiciary has exhibited racial bias in its rulings, in Ms. Huck and Ms. McKinley's cases the court rulings have been correct, procedurally and substantively, under state law. To the extent that those rulings have been in Mr. Berry's favor, he has ignored them in his briefing to this Court. To the extent those rulings have been against him, there have been good reasons for those rulings.

Mr. Berry has also ignored the background of the *Jones v. Berry* Interpleader case, and why that suit was filed and what relief it seeks. The Interpleader suit was filed only after Mr. Berry himself sued Ms. Huck and her attorney, claiming that they had

converted his videotapes. When another individual also claimed a right to possess the tapes, Mr. Jones, Ms. Huck and Ms. McKinley filed the Interpleader suit to allow the videotapes to be deposited with the trial court so that these competing claims could be adjudicated. The Interpleader suit was a proper and appropriate procedure under state law, necessitated in large part by Mr. Berry's own actions. His current claim, that the Interpleader action was a "vehicle to unlawfully circumvent his right to a jury trial" is ludicrous.

Mr. Berry, in essence, contends that these personal injury cases were rigged against him because of his race and wealth. As to Ms. Huck's and Ms. McKinley's case, the plaintiff sued not only Mr. Berry, but his corporation which owned and operated the restaurant business, a Ms. Gillium, the manager of the restaurant, and a Ms. Schmitt who allegedly assisted Mr. Berry in making the videotapes. And, far from being rigged, Ms. Huck and Ms. McKinley have been unable after over three years of litigation to get their damage suit to trial, largely because of the procedural maneuverings and delaying tactics of Mr. Berry. A reading of the full record provides overwhelming evidence that the attempted removal of these cases, the appeal to the Eighth Circuit and this resulting Petition for Certiorari are only the latest efforts by Mr. Berry to delay and hinder the progress of the state court damage actions.

According to Mr. Berry this case "presents the novel question of law whether a 'racially motivated economic lynching' in the civil and criminal proceedings against Petitioner in St. Charles County. . . " suffice to state a basis for removal under § 1443(1). (Petitioner's Brief at p. 3). Under well-settled legal principles decided by this Court, there is no basis for removal. Moreover, in this brief, Ms. Huck and Ms. McKinley will demonstrate that Mr. Berry's factual allegations regarding the proceedings in the cases below are simply untrue.

A. ***Huck and McKinley v. Berry et al.***

This state court damage action against Mr. Berry and others alleges that Mr. Berry invaded the plaintiffs' privacy by videotaping them using the women's restroom at his restaurant without their permission. The plaintiffs also alleged that the caucasian manager of the restaurant was negligent in permitting the videotaping to occur, and that a caucasian acquaintance of Mr. Berry assisted him in making the videotapes. All three were defendants.

On March 16, 1990, Mr. Berry called for hearing his Motion to Dismiss the case for lack of subject matter jurisdiction, claiming that the Missouri worker's compensation law provided the exclusive remedy for plaintiffs as a result of the restroom videotaping. After extensive briefing and argument before the Circuit Court, Mr. Berry's Motion to Dismiss was overruled March 16, 1990.

In his allegations concerning the procedural history of these cases below, Mr. Berry ignores the fact that the Circuit Court granted him requested relief on deadlines and discovery matters on February 26, 1990, March 30, 1990, April 2, 1990, April 4, 1990, April 12, 1990, June 29, 1990 and September 4, 1990. The Circuit Court also refused to grant Ms. Huck and Ms. McKinley's Motion to Compel Mr. Berry's co-defendant, Ms. Schmitt to answer questions on deposition on December 7, 1990 and March 3, 1991. In short, Mr. Berry has received both favorable and unfavorable rulings in this case, as have plaintiffs.

Mr. Berry's Notice of Removal in *Huck v. Berry* was filed August 2, 1991. The original Petition had been filed February 26, 1989, and a Second Amended Petition was filed December 7, 1990. The circuit court's docket sheet reveal that the last activity in *Huck v. Berry* in the Circuit Court of St. Charles, Missouri was Plaintiff's

Response to Defendants' Request for Production of Documents, filed April 19, 1991. Thus, the court record below reveals that the Notice of Removal was filed approximately one and one-half years after the filing of the Second Amended Petition, and about four months after the filing of the last preceding papers in the circuit court.

B. ***Berry v. Jones and Huck***

On April 27, 1990, Mr. Berry filed a suit against Ms. Huck and her attorney Mr. Jones. In Count I of his Petition, Mr. Berry alleged that Ms. Huck and her attorney had converted his videotapes.

On May 29, 1990, Ms. Huck and Mr. Jones propounded Interrogatories to Mr. Berry. After Mr. Berry filed responses to the Interrogatories, Mr. Jones filed a Motion to Compel Interrogatory Answers, claiming that Mr. Berry had given vague and incomplete Answers to two of those interrogatories. On September 21, 1990, Mr. Berry's counsel agreed and was ordered to fully answer the two interrogatories in question within twenty (20) days. Mr. Berry failed to answer those interrogatories within twenty (20) days in violation of the Order. Mr. Jones' counsel then wrote counsel for Mr. Berry and inquired as to why the answers were not filed. When the answers were still not filed, Mr. Jones' counsel contacted counsel for Mr. Berry and advised that the interrogatory answers were needed prior to depositions scheduled for October 29, 1990. Mr. Berry's counsel agreed to make every effort to file the interrogatory answers before the depositions. The interrogatories were not answered and Mr. Jones' counsel then filed a Motion for Sanctions and scheduled it for November 16, 1990. At that hearing, Mr. Berry's counsel again requested additional time to file the answers.

Mr. Berry's former counsel then withdrew, and his present counsel entered an appearance.

At Mr. Berry's deposition, he was asked about the two as-yet unanswered interrogatory questions. Mr. Berry did not give a definitive answer on the questions concerning which specific videotapes he claimed were taken from him, or who he claimed Mr. Jones had shown them to.

The Motion for Sanctions was again scheduled for hearing on November 30, 1990. The day before that hearing Mr. Berry's counsel called and again asked for additional time to answer the interrogatories. Mr. Jones' counsel agreed to allow five (5) additional days to answer those interrogatories. On the fifth day, Mr. Berry filed his supplemental answers to the two interrogatories which stated only that the information requested was, or could have been covered in the deposition of Mr. Berry. Having sought answers to the interrogatories for eight (8) months, Mr. Jones then filed a new Motion for Sanctions alleging that the supplemental answers were evasive and deficient, and seeking dismissal of Berry's Petition as a sanction for defendant's deliberate and repeated violation of the trial court's discovery Order.

On December 26, 1990, Mr. Jones served a Notice of Hearing upon Mr. Berry's attorney calling up the Motion for Sanctions for hearing on Friday, January 4, 1991. Mr. Jones' attorney appeared on January 4, 1991, but Mr. Berry's counsel failed to appear. The trial court sustained the Motion for Sanctions and dismissed the cause with prejudice as to Mr. Jones for Mr. Berry's failure to comply with the court's Order dated September 21, 1990. Mr. Berry's counsel filed no Motions for Protective Order or papers seeking any continuance prior to the January 4, 1991 hearing date on the Motion for Sanctions.

Mr. Berry's counsel then filed a Motion for Reconsideration of the Order of Dismissal on January 14, 1991. In the Motion for Reconsideration, Mr. Berry's counsel did not allege that anyone agreed to continue the January 4 hearing on the Motion for

Sanctions. Rather, Mr. Berry's counsel claimed that he had to be out of the city on more urgent business, despite the fact that the interrogatories had been pending for eight (8) months and Mr. Jones' counsel had made three previous attempts to have the Motion for Sanctions heard, on November 3, 1990, November 16, 1990 and November 30, 1990. It was with this procedural background that the Missouri circuit judge entered his sanctions Order, and denied Mr. Berry's Motion for Reconsideration of that Order.

A second sanctions Order was entered in *Berry v. Huck and Jones* on March 8, 1991, imposing a two thousand four dollar ($2,004) monetary sanction against Mr. Berry and his attorney due to Ms. Huck's inability to take the deposition of Ms. Schmitt. On October 16, 1990, Ms. Huck had served Ms. Schmitt, then a non-party witness regarding this action, with a subpoena to appear on December 17, 1990 to give her deposition. Ms. Schmitt was served with the subpoena by a certified court reporter and on November 6, 1990, Ms. Schmitt cashed the witness fee check tendered to her with the subpoena. On December 5, 1990, counsel for Ms. Huck filed a Notice of Deposition regarding the deposition of Ms. Schmitt, and the notice was served upon Mr. Berry's counsel. The notice scheduled the deposition for December 17, 1990. At no time prior to that date, did either the witness, Ms. Schmitt, or Mr. Berry file any Motion to Quash the subpoena, any Motion for Protective Order or any pleadings seeking any other relief regarding the subpoena or the deposition. On December 13, 1990, Ms. Huck's counsel notified Mr. Berry's counsel by facsimile letter that the deposition scheduled for December 17, 1990 would go forward. However, Ms. Schmitt failed to appear for her deposition on December 17, 1990 although defendants' counsel were present and ready to proceed.

The reason Ms. Schmitt failed to appear was that Mr. Berry's counsel directed her not to do so despite the subpoena lawfully

served upon her. Mr. Berry's counsel unabashedly stated in open court that he had advised Ms. Schmitt that, until she got a lawyer, she should not appear for the deposition. Following the aborted deposition, Ms. Huck filed her Motion for Sanctions on January 11, 1991 seeking either dismissal of Mr. Berry's action or an Order directing Mr. Berry and his counsel to pay to Ms. Huck the sum of two thousand four dollars ($2,004) representing attorney's fees incurred in connection with the attempt to take Ms. Schmitt's deposition. Ms. Huck claimed that Mr. Berry's counsel's conduct was improper, in that he had interfered and unlawfully obstructed Ms. Huck's access to evidence. Mr. Berry's counsel acknowledged that he did not represent Ms. Schmitt.

The Motion for Sanctions was called for hearing on January 18, 1991 with all counsel appearing. The trial court heard argument of counsel and received Ms. Huck's attorney's affidavit by stipulation. The trial court then found the issues in favor of Ms. Huck and granted sanctions against Mr. Berry and his attorney in the amount of two thousand four dollars ($2,004) representing the costs, expenses and reasonable attorney's fees incurred by Ms. Huck in connection with the unsuccessful attempt to take Ms. Schmitt's deposition on December 17, 1990 and in bringing the motion. It is with this procedural background that the Missouri circuit judge imposed the second Sanction Order.

Also in *Berry v. Huck and Jones* on June 4, 1990, Ms. Huck filed a Motion to Dismiss alleging, *inter alia*, that there was another action pending between the same parties in the same court (that being Berry's identical counterclaim against Ms. Huck in the original *Huck v. Berry* action). Ms. Huck's Motion to Dismiss was noticed for hearing on March 8, 1991. On March 8, 1991, the parties appeared and the Missouri circuit judge ordered *Berry v. Huck and Jones* dismissed as to Ms. Huck. Mr. Berry has made no complaint about that ruling in his appeal or in his Brief in this Court. Thus, as of March 8, 1991, both Mr. Jones and Ms. Huck had

been dismissed from the *Berry v. Huck and Jones* action.

Mr. Berry does complain in his Brief of an April 3, 1991 ruling of the Missouri circuit judge granting "*ex parte*" Mr. Jones' Motion to Certify as final and appealable the January 4, 1991 Sanctions Order dismissing Mr. Jones from the litigation. Yet, by April 3, 1991, both Mr. Jones and Ms. Huck had already been dismissed from the case and the Order dismissing Mr. Jones had become final and appealable by operation of law upon the dismissal of Ms. Huck on March 8, 1991. Thus, the Motion to Certify the earlier sanction Order as final and appealable was moot and had no effect on Mr. Berry's appeal rights. Mr. Berry's counsel was present in court on May 8, 1991 when Ms. Huck, the last remaining defendant, was dismissed from *Berry v. Huck and Jones.*

Mr. Berry also fails to advise the Court that on June 14, 1990, the same Missouri circuit judges granted his request for additional time regarding plaintiffs' discovery requests. On July 20, 1990 the court granted him leave to file his Amended Petition, and on August 24, 1990 the trial court denied Mr. Jones' Motion for Summary Judgment. In short, Mr. Berry, Mr. Jones and Ms. Huck each received favorable and unfavorable rulings from the Missouri circuit court.

C. *Jones, Huck and McKinley v. Berry* (Interpleader Suit)

As previously noted on April 27, 1990, Mr. Berry filed his Petition for conversion against Ms. Huck and her attorney Mr. Jones alleging that they had converted certain of his videotapes. Mr. Jones had also received a demand from one Vincent Huck, claiming that he was entitled to possession of the videotapes. Accordingly, Mr. Jones, Ms. Huck and Ms. McKinley were faced with several competing demands regarding the videotapes: Mr. Berry's suit claiming that his property had been converted, Mr. Huck's demand for possession, and the need to preserve the

videotapes undamaged for use as evidence in the pending damage action *Huck v. Berry.*

Accordingly, a Petition in Interpleader was filed May 3, 1990, approximately one week after Mr. Berry sued Mr. Jones and Ms. Huck for converting his videotapes. The Petition alleged that Mr. Jones had possession of twenty (20) videotapes which lawfully came into his possession during investigation of a client's claim for damages, and that such videotapes constituted evidence in the *Huck v. Berry* case. The Petition further alleged the competing demands for possession of the videotapes which had been received. The Petition in Interpleader made clear that Ms. Huck and Ms. McKinley claimed no ownership interest in the videotapes, but did have an interest in their being preserved as evidence for use in their damage actions. The Petition alleged that Mr. Jones, Ms. Huck and Ms. McKinley were subject to multiple and potentially inconsistent liabilities as a result of the competing demands for the tapes, and requested an Order that they be allowed to tender the videotapes into court and be discharged from any further liability in connection with their possession.

Secondly, the Petition requested that the trial court order the interpleader defendants and other interested parties to implead their claims for possession or ownership of the videotapes, and that the court then finally determine who was entitled to the videotapes, but maintain copies of the videotapes for trial in connection with the damage suits.

In his answer to the Petition, Mr. Berry admitted his demand to Mr. Jones seeking the return of videotapes which were or are his property. In his Answer, Mr. Berry made no allegations that the interpleader was a vehicle to unlawfully circumvent his right to a jury trial on a fact issue crucial to imposing liability in the civil damage actions (precisely the claim he now makes three years later. (Mr. Berry's Brief, p. 11).

On March 19, 1991, Glenda Jean Turner, who was originally a co-plaintiff with Ms. Huck and Ms. McKinley in the interpleader action, filed her Voluntary Dismissal Without Prejudice. On or about April 2, 1991, the Circuit Clerk of St. Charles County on her own initiative made a docket entry, that on the parties' stipulation, the cause was ordered dismissed without prejudice at Mr. Berry's cost. Apparently, the clerk mistakenly interpreted Ms. Turner's voluntary dismissal as a stipulation to dismiss the entire action as to all four plaintiffs. While the dismissal docket entry purported to assess costs against Mr. Berry, the court record does not contain any indication that Mr. Berry has ever paid any costs in that action. Plaintiffs paid the costs of service of process when the interpleader suit was filed, so presumably there are no costs outstanding in that action.

On September 12, 1991, Mr. Jones filed a Motion of Plaintiff for Relief of Order and To Reopen Case, seeking to correct the clerk's clerical error in dismissing the case and to have the interpleader case reopened. The same day Mr. Jones filed a Notice of Hearing seeking to call up his Motion In Interpleader on Friday, September 20, 1991. On September 19, 1991, Mr. Berry filed his Notice of Removal to Federal Court. That Notice of Removal was filed approximately one and one-half years after the original filing of the interpleader action, and approximately six months after the clerk's docket entry of dismissal which Mr. Berry now contends somehow constituted a violation of his civil rights.

D. *Berry v. Hannah* and *Berry v. Boggs*

On November 2, 1990, Mr. Berry filed suit against William J. Hannah, the Prosecuting Attorney of St. Charles County, in the United States District Court for the Eastern District of Missouri, and against numerous unnamed "Doe" defendants (*Berry v. Hannah*). On November 20, 1990, Mr. Berry filed his dismissal of that action with prejudice.

Recently, Mr. Berry has filed an action against numerous other defendants, including all of the plaintiffs in the civil damage actions, their attorneys, certain St. Charles County deputy sheriffs and others, styled *Berry v. Boggs. et al.* The allegations of *Berry v. Hannah* and *Berry v. Boggs* include all of the same claims of a "racially-motivated misuse of state court civil procedures and criminal prosecuting authority by private litigants and their attorneys working in concert with state actors" and a conspiracy to achieve an "economic-lynching of a uniquely American cultural icon. . . ." which are made here. Yet, *Berry v. Hannah* was dismissed with prejudice approximately nine months prior to Mr. Berry seeking to remove any of the state court damage cases or the interpleader case to federal court.

E. The State's Prosecution of Mr. Berry

Mr. Berry's brief contains many statements and complaints about the institution of criminal charges against him resulting from a "raid" on his residence in June 1990. One result of that "raid" was that Mr. Berry was found guilty and convicted of the Class A misdemeanor of possession of a controlled substance, *i.e.*, marijuana in violation of R.S. Mo.§§ 558.011.1(5) and 560.016.

Mr. Berry in his deposition, admitted that he had previously been convicted of the felonies of armed robbery, violation of the Mann Act and income tax evasion.

SUMMARY OF ARGUMENT

The remand orders entered by the district court were decided correctly as a matter of law. The district court correctly ruled that Mr. Berry had not pleaded in his removal papers a violation of any law "providing for specific civil rights stated in terms of racial equality." Mr. Berry's allegations of violations of his right to equal protection of the laws as guaranteed by the Fourteenth Amendment

and of 42 U.S.C. § 1985(3) invoke only laws that confer equal rights upon all citizens. Such violations, even if they existed, would not support removal under § 1443(1).

Similarly, Mr. Berry's allegations of racially-motivated judicial misconduct are insufficient to invoke removal. The controlling Supreme Court cases hold that state officials' actions must be pursuant to some explicit state law or statute to invoke removal under § 1443. Mr. Berry fails to allege that any state statute or law compels or mandates the misconduct he alleges. Rather, Mr. Berry improperly requests this Court to engage in the "unseemly process of prejudging their brethren of the state courts." *Georgia v. Rachel*, 384 U.S. 780, 803-04 (1966).

There is an independent basis for affirming the district court's remand orders, in that the court records below in *Huck v. Berry* and *Jones v. Berry* unequivocally establish that Mr. Berry's petitions for removal in those two cases were untimely under 28 U.S.C. § 1446.

Mr. Berry's allegations that the Missouri workers' compensation law provides an exclusive remedy for Ms. Huck and Ms. McKinley's injuries, and that the overruling of his Motion to Dismiss for Lack of Subject Matter Jurisdiction in the state court resulted from race discrimination lacks any legal or factual support. Ms. Huck and Ms. McKinley do not allege in their petition that Mr. Berry was their employer, so the Missouri workers' compensation law provides him no protection from civil suit. Furthermore, the Missouri workers' compensation law does not even apply to the type of intentional, outrageous conduct alleged in *Huck v. Berry*.

Mr. Berry's claim that he will be subjected to an unconstitutional award of punitive damages is pure speculation at this time. Under controlling Supreme Court precedent, it is

presumed that the state court will exercise its discretion properly to protect a litigant's rights.

Finally, the factual allegations raised by Mr. Berry concerning unfair treatment by the Circuit Court of St. Charles County, Missouri are not supported by the record. Ms. Huck and Ms. McKinley will demonstrate that Mr. Berry and his counsel have richly deserved any adverse rulings rendered against them in the state courts. There is not one iota of evidence that any sanctions ruling in *Huck v. Berry* or *Jones v. Berry* was the result of racial animus.

REASONS FOR DENYING THE WRIT

I.

MR. BERRY'S ALLEGATIONS THAT STATE COURT DAMAGE ACTIONS FOR INVASION OF PRIVACY HAVE VIOLATED HIS RIGHTS GUARANTEED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND 42 U.S.C. § 1985(3) DO NOT INVOKE LAWS PROVIDING FOR EQUAL CIVIL RIGHTS FOR PURPOSES OF REMOVAL UNDER THE CIVIL RIGHTS REMOVAL ACT, 28 U.S.C. § 1443(1), BECAUSE UNDER SETTLED CASE LAW, NEITHER THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE NOR 42 U.S.C. § 1985(3) IS A LAW PROVIDING FOR SPECIFIC CIVIL RIGHTS STATED IN TERMS OF RACIAL EQUALITY.

On appeal, Mr. Berry relies upon only two provisions of law to support removal: the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1985(3). He claims that since he cannot enforce his civil rights guaranteed to him as a citizen under these provisions in the

Missouri state courts, removal is proper under 28 U.S.C. § 1443(1). His argument is wrong in all respects.

In *Georgia v. Rachel,* 384 U.S. 780, 788 (1966), this Honorable Court held that a defendant seeking to remove under 28 U.S.C. § 1443(1) must show two elements: (1) that the right upon which they rely is a "right under any law providing for . . . equal civil rights," *id.* at 788, and more specifically a law "providing for specific civil rights stated in terms of racial equality." *id.* at 792; and (2) that they are "denied or cannot enforce" those rights in the state court. *Id.* at 788. Mr. Berry can meet neither test.

In *Rachel,* the Supreme Court specifically rejected the argument that removal would be proper merely by invoking the protection of various facially-neutral constitutional provisions. The Court stated:

> We conclude that the phrase "any law providing for . . . equal civil rights" must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendant's broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under § 1443, because the guaranties of those clauses are phrased in terms of general application available to all persons who are citizens, rather than in the specific language of racial equality that § 1443 demands.

Id. at 792. In *Rachel*, this Court found removal proper because the defendants had alleged violations of specific provisions of the Civil Rights Act of 1964, which provide specific civil rights stated in terms of racial equality. Removal in *Rachel* was proper because the defendants "did not rely solely on . . . broad constitutional

claims in their removal petition." *Id.* Thus, the Supreme Court has explicitly found that a right to removal must be based on a specific law such as the Civil Rights Act of 1964, rather than on general laws "of which the Due Process Clause and 42 U.S.C. § 1983 are sufficient examples, that confer equal rights in the sense vital to our way of life, of bestowing them upon all." *Id.* at 792.

In comparison, Mr. Berry makes only broad conclusory allegations about denials of constitutional protection without citing any specific law stating protection in terms of racial equality. Mr. Berry's reliance on 42 U.S.C. § 1985(3) does not meet the *Rachel* test, and does not allow removal. That law is also one of general applicability; it does not specifically refer to racial equality. Mr. Berry's reliance on *Griffin v. Breckenridge*, 403 U.S. 88 (1971) for the proposition that § 1985 would support removal is misplaced. *Griffin* specifically noted that to state a claim for violation of § 1985 the complaint *must* aver "some racial, *or perhaps class-based*, invidiously discriminatory animus behind the conspirator's actions." *Id.* at 102 (emphasis added). Thus, § 1985 provides protection to victims of *any* class-based conspiracies, which could include, but which are certainly not limited to, conspiracies based solely on race. Therefore, removal is not proper under 28 U.S.C. § 1443(1) based on alleged violations of 42 U.S.C. § 1985. Even assuming Mr. Berry could prove his outrageous accusations, the statutes do not grant a right to remove these cases.

The cases cited by Mr. Berry to support his claim that alleged violations of the Fourteenth Amendment Equal Protection Clause allow removal simply do not apply. First, we again note that the Fourteenth Amendment provides equal rights to all citizens, not just protection against racial discrimination. *Georgia v. Rachel*, 384 U.S. 780, 792 (1966); *Sullivan v. State of Missouri*, 588 F.2d 579, 580 (8th Cir. 1978).

Secondly, Mr. Berry cites *Dodd v. Rue*, 478 F. Supp. 975, 977

(S. D. Ohio 1979) and *Greenberg v. Veteran*, 889 F.2d 418 (2d Cir. 1989) as support for his claim that the Fourteenth Amendment Equal Protection Clause is a law providing equal rights for purposes of removal under 28 U.S.C. § 1443(1). These cases do not even deal with § 1443(1). Rather, they analyze removal under § 1443(2), a statute not relied upon nor cited by Mr. Berry in his brief.

As a matter of law, Mr. Berry has not alleged any violation of a law providing specific civil rights stated in terms of racial equality, and his petitions for removal in *Huck v. Berry* and *Jones v. Berry* therefore fail to state any claim upon which relief could be granted. The district court's order of remand was proper, and the Petition for Writ of Certiorari should be denied.

II.

MR. BERRY'S ALLEGATION OF A PATTERN OF RACIALLY-MOTIVATED ACTIONS DURING THE COURSE OF STATE COURT CRIMINAL AND CIVIL PROCEEDINGS PROVIDES NO BASIS FOR INVOKING THE CIVIL RIGHTS REMOVAL ACT, 28 U.S.C. § 1443(1) TO REMOVE STATE COURT DAMAGE ACTIONS TO FEDERAL COURT, IN THAT CONTROLLING PRECEDENT OF THIS COURT HOLDS THAT STATE OFFICIALS' ACTIONS MUST BE PURSUANT TO SOME EXPLICIT STATE LAW OR STATUTE TO INVOKE REMOVAL UNDER § 1443, AND MR. BERRY FAILS TO ALLEGE THAT ANY MISSOURI STATUTE OR LAW COMPELS OR MANDATES THE MISCONDUCT HE ALLEGES. TO ALLOW REMOVAL, THIS COURT WOULD HAVE TO ENGAGE IN THE "UNSEEMLY PROCESS OF PREJUDGING THEIR BRETHREN OF THE STATE COURTS." *GEORGIA V. RACHEL*, 384 U.S. 803-04 (1966).

Mr. Berry's second assertion is that the state judiciary and/or

state prosecutor have engaged in a pattern of racially discriminatory misconduct toward him in the state court proceedings. Even if his wild allegations were true, these are insufficient grounds for removal under 28 U.S.C. § 1443(1) for at least two reasons.

First, Mr. Berry's claim fails the second prong of the two-part test set forth in *Georgia v. Rachel*, 384 U.S. 780, 788 (1966). His unsupported, speculative contention that he will in the future be denied a fair trial in state court is not a sufficient ground for removal. *Greenwood v. Peacock*, 384 U.S. 808, 827-828 (1966); *Sullivan v. State of Missouri*, 588 F.2d 579, 580 (8th Cir. 1978). The federal courts do not engage "in the unseemly process of prejudging their brethren of the state court." *Georgia v. Rachel*, 384 U.S. at 803-04. As noted by this Court in *Greenwood v. Peacock*, 384 U.S. at 956-957:

> It is not enough to support removal under § 1443(1) to allege or show that the defendants' federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the state any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial.

The second flaw in Mr. Berry's argument concerning prosecutorial and judicial misconduct is that there is no showing that these state officials have been acting pursuant to a specific state law or statute. *Georgia v. Rachel*, 384 U.S. at 798. This Court in *Rachel* found a presumption that the state court will act in a proper manner, unless the defendant can show some specific state statute or law which provides an impediment to the enforcement of his federal constitutional rights. No such showing has been made here. As noted in *Rachel*:

> Removal is not warranted by an assertion that a denial or rights of equality may take place and go uncorrected at trial. Removal is warranted only if it can be predicted *by reference to a law of general application* that the defendant will be denied or cannot enforce the specified federal rights in the state courts.

384 U.S. at 800 (emphasis added).

Here, Mr. Berry has not shown any Missouri statute or constitutional provision which places any impediment to him enforcing his federal constitutional rights in the state court. His unsupported allegations that the state court judges have erred at all, and that such alleged errors are the result of racial animus, simply do not suffice for purposes of § 1443.

Mr. Berry also argues that the mere institution of a state court proceeding, if motivated by racial animus, is sufficient to support removal under § 1443 even if the state law invoked is racially-neutral. Neither *Georgia v. Rachel, supra*, nor *Sofarelli v. Pinellas County*, 931 F.2d 718 (11th Cir. 1991) support Mr. Berry's position. In *Rachel*, the institution of a trespass prosecution under Georgia state laws clearly implicated the defendants' *specific* federal rights under the Civil Rights Act of 1964. 384 U.S. at 804-805. In

Sofarelli, the state court injunction suit impacted the *specific* federal rights guaranteed by the Fair Housing Act, 42 U.S.C. § 3604.

In contrast, Mr. Berry's allegations of judicial misconduct here provide no "firm prediction" that any specific federal rights of Mr. Berry will be implicated. First, no state law has been identified which requires the alleged misconduct. Secondly, it is pure speculation by Mr. Berry at this point in time that he cannot receive a fair trial in the state courts of St. Charles County. Third, he is unable to predict that any specific federal right provided by a loss stated in specific terms of racial equality will ever be implicated here.

Finally, and perhaps most importantly, Mr. Berry's allegations of judicial misconduct in *Huck v. Berry, Jones v. Berry* and *Berry v. Jones and Huck* are flatly contradicted by the records in the state court. First, overruling of Mr. Berry's Motion to Dismiss *Huck v. Berry* for lack of subject matter jurisdiction on the grounds that the workers' compensation law provided an exclusive remedy, was an absolutely correct application of Missouri law. The most glaring flaw in Mr. Berry's argument about the workers' compensation law exclusive remedy doctrine is that Ms. Huck and Ms. McKinley in their Second Amended Petition did not even allege that Mr. Berry was their employer. Rather, they alleged that they were employed by defendant Chuck Berry Communication Systems, Inc. and/or defendant Francine Gilliam. Under Missouri law, Mr. Berry as the sole or a majority shareholder of Chuck Berry Communications Systems, Inc. is not treated as an employer, but rather is considered a co-employee of the plaintiffs, negating any claim that the workers' compensation law should bar their causes of action against him. *Craft v. Scaman*, 715 S.W.2d 531, 538 (Mo. App. 1986) (president and principal shareholder of a corporation was liable to an injured employee in a common law tort action as a co-employee). *See also, Rhodes v. Rogers*, 675 S.W.2d 107, 108 (Mo. App. 1984).

Secondly, Mr. Berry's assertion that Missouri law provides that the workers' compensation law is an exclusive remedy for the types of intentional invasion of privacy claims asserted by Ms. Huck and Ms. McKinley is flatly wrong. Missouri courts have held that where "an employer acts intentionally and it is substantially certain that injury to an employee will result, the employer has a specific purpose to inflict injury and therefore the conduct is actionable as being an exception to the exclusivity provision of the Workers' Compensation statutes . . ." *Speck v. Union Electric Co.*, 741 S.W.2d 280, 283 (Mo. App. 1987); *McCoy v. Liberty Foundry Co.*, 635 S.W.2d 60 (Mo. App. 1982). Ms. Huck and Ms. McKinley allege that Mr. Berry and his corporation engaged in deliberate and intentional tortious conduct toward them by surreptitiously videotaping their most private activities, which would be offensive to any decent person in the community. The alleged tortious conduct was so far outside the bounds of decency that it is ludicrous to suggest that the drafters of Missouri's workers' compensation law would have contemplated providing the protection of the Act to these defendants. Under Missouri law, there is simply no basis for stating that the type of injuries to their privacy and the humiliation suffered by Ms. Huck and Ms. McKinley were a natural and reasonable incident of their employment or a rational consequence of some hazard related to their work. *Pryor v. United States Gypsum Co.*, 585 F. Supp. 311 (W. D. Mo. 1984).

At the very least, the question of the applicability of the workers' compensation law is one upon which reasonable judicial minds could differ. The circuit judge's ruling denying Mr. Berry's Motion to Dismiss cannot under any stretch of the imagination be categorized as obviously wrong or an intentional misapplication of the law. There is no basis in the court record for a finding, or even a suggestion that the circuit judge ruled on the basis of racial bias. His ruling is supported by ample judicial authority and is a correct statement of Missouri law.

In their summary of the case, respondents have detailed the history of the sanctions orders entered against Mr. Berry and his counsel in the state courts. The procedural history underlying those orders demonstrates that they were entered as a result of Mr. Berry's refusal to comply with discovery Orders, and his interference with the investigative and discovery efforts of the plaintiffs in the state court damage actions against him. Under any standard, the sanctions Order for Mr. Berry's refusal to comply with discovery Orders was not an abuse of discretion. The second sanctions Order in *Berry v. Huck and Jones* was equally well-deserved. It came only after Ms. Huck established on the record that Mr. Berry's counsel had deliberately and intentionally instructed a properly subpoenaed non-party witness not to appear for her deposition. Coming directly on the heels of the previous fiasco of delay and hindrance relating to the interrogatory answers, the trial court had every right to impose a monetary sanction against Mr. Berry and his attorney to defray the costs, expenses and attorneys' fees incurred by Ms. Huck due to their actions. That Order could not possibly be found an abuse of discretion.

Finally, Mr. Berry's complaints that the interpleader action filed by Mr. Jones and Ms. Huck was a legal maneuver to violate his civil rights is simply preposterous. That interpleader action was filed approximately one week after Mr. Berry sued Mr. Jones and Ms. Huck claiming that they had converted *his* video tapes. The interpleader plaintiffs sought only to deposit those videotapes in court, to relieve Mr. Jones, Ms. Huck and Ms. McKinley from any liability for possession of those tapes, and ultimately to obtain a court ruling as to who was lawfully entitled to possession of the tapes. This was a proper and appropriate legal procedure which has no impact whatsoever on Mr. Berry's equal protection rights.

Far from showing a "firm prediction" that Mr. Berry would be denied a fair trial in Missouri state courts, the record in these cases shows a continual pattern of avoidance of discovery obligations

and delay which has exasperated at least three Missouri state court judges and one federal district judge sufficiently that they imposed sanction against Mr. Berry and his counsel. Mr. Berry's claims of judicial misconduct fail as a basis for removal, in that he has not shown that any state officials he accuses were acting pursuant to any state law or statute, and his "firm prediction" that he will be denied a fair trial is absolute speculation at this point. Accordingly, the district court properly remanded these cases and the Petition for Certiorari should be denied.

III.

THE RECORD BEFORE THE DISTRICT COURT AND THE EIGHTH CIRCUIT CONCLUSIVELY ESTABLISHES THAT THE SANCTION ORDERS ENTERED AGAINST MR. BERRY AND HIS COUNSEL IN THE STATE COURT PROCEEDINGS WERE RICHLY DESERVED DUE TO HIS CONTUMACEOUS AND DELIBERATE REFUSAL TO COMPLY WITH DISCOVERY ORDERS AND HIS DELIBERATE EFFORTS TO DELAY THE STATE COURT DAMAGE CASES AGAINST HIM. THEREFORE, THIS CASE IS FACTUALLY INAPPROPRIATE FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW THE ABSTRACT QUESTIONS OF LAW PRESENTED IN PETITIONER'S BRIEF.

As noted above, the procedural history underlying the various sanction Orders entered against Mr. Berry and his counsel in the courts below demonstrates that those Orders were entered not as a result of any judicial bias or racial animus against Mr. Berry, but as a result of his and his attorney's own conduct. The sanctions were entered only after repeated failures to comply with explicit discovery Orders, and after Mr. Berry's counsel intentionally directed a properly subpoenaed non-party witness not to appear for her properly-noticed deposition.

Furthermore, Mr. Berry's brief fails to advise this Court of the numerous instances, noted in respondents' Statement of the Case above, where Mr. Berry received favorable rulings from the same state circuit court judges he now accuses of conspiring against him.

It should also be noted that there is an independent basis for remand of these actions which was presented to but not relied upon by the district courts or the Eighth Circuit Court of Appeals. In both *Huck v. Berry* and *Jones v. Berry*, Mr. Berry's petitions for removal were untimely under 28 U.S.C. § 1446, because the petitions were not filed within thirty days after Mr. Berry's receipt of any amended pleading or paper from which it could first be ascertained that the case was removable.

28 U.S.C. § 1446 provides that a notice of removal in a civil action must be filed within thirty days after defendant receives a copy of the initial pleading setting forth a claim for relief, or within thirty days after defendant receives a copy of an amended pleading, motion, order or other paper "from which it may first be ascertained that the case is one which is or has become removable. . . ."

It is clear that the notices of removal in *Huck v. Berry* and *Jones v. Berry* were not filed within thirty days after service of process. The original Petition in *Huck v. Berry* was filed December 26, 1989, and served on Mr. Berry January 12, 1990. The Second Amended Petition in *Huck v. Berry* was filed December 7, 1990. The Notice of Removal in *Huck v. Berry* was not filed until August 2, 1991.

In *Jones v. Berry* the Petition in Interpleader was filed May 3, 1990 and served on Mr. Berry on May 11, 1990. The Notice of Removal was not filed until September 19, 1991.

Clearly, both Notices of Removal were untimely under the first paragraph of § 1446(b). They were also untimely under the

second paragraph of § 1446 (b), providing for amended pleadings which first set forth a basis for removal.

In *Huck v. Berry*, the state court's docket sheets revealed that there were no pleadings filed, rulings or activities of any kind in that action between April 19, 1991 and the filing of Mr. Berry's Notice of Removal on August 2, 1991. Thus, the *Huck v. Berry* Petition for Removal was filed at least four months after the filing of the last preceding papers in the circuit court.

In *Jones v. Berry* the only activity within thirty days of the filing of Mr. Berry's Notice of Removal was the filing by Mr. Jones on September 12, 1991 of a Motion of Plaintiff for Relief of Order and to Reopen Case, seeking to correct the circuit clerk's clerical error in dismissing the case, and a Notice of Hearing seeking to call up the Motion in Interpleader for Friday, September 20, 1991 .

Mr. Berry does not allege, and there is no possible basis for finding that Mr. Jones' Motion for Relief of Order And To Reopen Case and Notice of Hearing were papers "from which it may first be ascertained that the case is one which is or has become removable . . ." 28 U.S.C. § 1446(b). In light of all of Mr. Berry's accusations about the conspiracy against him, he has known of all the purported civil rights issues for well over a year before filing his Notice of Removal in *Jones v. Berry*. First, his brief and notices of removal make repeated references to various alleged civil rights violations that occurred in the summer of 1990. Then, in November 1990, Mr. Berry filed suit against William Hannah, the Prosecuting Attorney of St. Charles County, in federal court, alleging numerous civil rights violations and on November 20, 1990 Mr. Berry dismissed that action with prejudice. Next, Mr. Berry filed his notices of removal based on the alleged civil rights violations in *Huck v. Berry* and the other state court personal injury cases on August 2, 1991. More than thirty days after that date, he filed his Notice of Removal in the *Jones v. Berry* interpleader action on September 19, 1991.

Giving Mr. Berry the benefit of every possible doubt, his time for filing and Notice of Removal in *Jones v. Berry* expired by September 2, 1991. Mr. Jones' filing of the Motion to Reopen the case, and a simple Notice of Hearing did not create any of the alleged civil rights violations of which Mr. Berry complains, nor did it first alert Mr. Berry to the existence of those alleged violations.

Missouri courts have held that the time limit for removal is mandatory, and a timely objection to a late petition for removal must result in remand. *St. Louis Home Insulators v. Burroughs*, 597 F. Supp. 98 (E. D. Mo. 1984); *Rampy v. Southwestern Bell Telephone Co.*, 615 F. Supp. 996 (E. D. Mo. 1985).

Even if this Court believes that the abstract questions of law set forth in Mr. Berry's brief have some merit, this is not an appropriate case factually to justify certiorari. The simple fact is there is no support for Mr. Berry's fanciful allegations in the court records below. The state court damage actions were correctly remanded, and this Court should not utilize its precious time and resources on this case. The Petition for Certiorari should be denied.

CONCLUSION

The only pattern disclosed by the records in the courts below is a pattern of delay by Mr. Berry in the state court damage actions. Settled Supreme Court precedent establishes that there is no legal basis for removal of these actions. The strong inference from the entire record is that the filing of the notices of removal in the first place, the appeal to the Eighth Circuit and this Petition for Certiorari are all part of Mr. Berry's calculated process of delaying and hindering the progress of the state court cases against him. *Huck v. Berry* has been pending for three years, with no trial setting in sight. The relatively simple interpleader case has been pending two and one-half years, and plaintiffs have been unable even to

obtain a ruling from the state court on the threshold question of whether they may interplead the videotapes into court.

Ms. Huck and Ms. McKinley respectfully request this Court to see this purported removal for what it is, to put a stop to the delay by quickly denying the Petition for Certiorari, and to grant them such additional relief as this Court deems appropriate under the circumstances.

Respectfully submitted,

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